INTERNATIONAL BUSINESS SYSTEMS, INC.

CONTRACT NO. V101(93)P-1453 **VABCA-5610**

VA MEDICAL CENTER
BROCKTON, MASSACHUSETTS

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Millicent M. Gompertz, Esq., Trial Attorney; ***Charlma J. Quarles, Esq.,*** Deputy Assistant General Counsel; and ***Phillipa L. Anderson, Esq.,*** Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

OPINION BY ADMINISTRATIVE JUDGE PULLARA
(Rule 12.2, Small Claims Expedited Procedure)

This appeal was taken from a contracting officer's final decision denying Appellant's $30,000 claim for additional compensation for riser cable. The appeal was docketed on July 21, 1998, under the Board's Rule 12.2, Small Claims Expedited Procedure, requiring decision of the appeal, whenever possible, within 120 days, or by November 18, 1998. Written decisions by the Board under this procedure are to be brief and contain only summary findings of fact and conclusions.

A hearing was held on October 29, 1998, in Washington, D.C., the undersigned Administrative Judge presiding. A copy of the transcript is enclosed for each party.

The Appellant sought an increase in its contract price of $30,000 for the installation of riser cable at the West Roxbury VA Medical Center (VAMC). At the hearing, Appellant made three arguments: first, that Supplemental Agreement No. 24, signed by the Contractor on May 18, 1996, and providing for a contract price increase for riser cable, was a valid and binding agreement between the two parties; second, that Supplemental Agreement No. 24, signed by the Contractor on May 18, 1996, was the correct agreement because there was existing, VA-owned riser cable in the building that was available to be retained and not replaced; and third, the Appellant's original contract price proposal did not include the cost of riser cable at the West Roxbury VAMC and that fairness and equity call for additional compensation being granted on a quantum meruit basis.

The Government took the position that the contract required the installation of riser cable and, thus, the Contractor performed no more than was required by the contract when it installed such cable. With respect to Supplemental Agreement No. 24, the Government contends that there was no meeting of the minds on an early version of that agreement, which did include payment for riser cable, but was not signed by the Contracting Officer, and that, in fact, such version was withdrawn and a final version executed by both parties that did not include riser cable. With respect to Appellant's quantum meruit theory, the Government argues that there is no basis for entitlement in law, and that the riser cable was required by the contract.

FINDINGS OF FACT

The subject 8(a) contract, in the amount of $3,996,620, for the replacement of telephone systems at the VA Medical Centers in Brockton and West Roxbury, Massachusetts, was awarded to International Business Systems, Inc. (Appellant or Contractor) on October 26, 1994, through the Small Business Administration. (R4, tab 1) On February 8, 1995, Appellant subcontracted with Johnson Controls Network Integration Services, Inc. (JCNISI), in the amount of $1,244,410.03 for the installation of the cabling system portion of its telephone system replacement contract. (R4, tab 11; tr. 54)

The technical requirements of the project were set forth in the VA's Request for Proposal (RFP) No. 101-20-94, Section C, Description/Specifications/Work Statement. Paragraph C.11.0, Scope, described the telephone system as an Electronic Private Automatic Branch Exchange (EPABX) which encompassed all common equipment, peripheral equipment, and cable distribution system necessary to install a complete voice and data digital telephone system. The contractor was responsible for replacing the Government owned EPABX at West Roxbury.

Paragraph C.7, Cabling, stated that "Cabling necessary to accomplish the installation is the responsibility of the Contractor. . . ." Paragraph C.12.43, Cable Distribution System: Twisted Pair and Fiber Optic: Sub-Paragraph C.12.43.1, stated that "[t]he contractor shall be responsible for providing a new cable distribution system conforming to Building Industry Consulting Service International standards (BICSI)." Sub-paragraph 12.43.1.1 stated that "The Contractor shall design and install the cable distribution system using the pathways (conduit, etc.) provided by the VA."

The riser cable is just a small part of the cable distribution system. (Tr. 45) Specific references to riser cables in the specifications included Sub-Paragraphs 12.43.1.2 ("Cable used to install the new distribution system (outside plant, inside riser, and station cabling) shall conform to . . . ") and 12.43.1.3 ("The contractor shall provide and install outside plant and inside riser to provide the number of cable pairs required in accordance with the Cable Distribution System Requirements located in Paragraph C.15.1"). (R4, tab 1)

Paragraph C.15, Cable Distribution System Design Plan and Station Equipment Configuration, stated:

> C.15.1 Cable Distribution Design Plan. A design plan for twisted pair requirements is provided with this document. It is the offerors responsibility to extract cable requirements from the Facility Layout Sheets provided in this section to develop a copper distribution requirements plan . . . The entire cost to provide and install a complete cable distribution system must be included in the offerors proposal.

(R4, tab 1)

Sub-Paragraph C.15.1.1, Twisted Pair Requirements/Column Explanation, explained the column heading, Number of Cable Pair, as "Identifies the number of cable pair required to be terminated on the floor designated or the number of cable pair (VA Owned) to be retained." Sub-Paragraph C.15.5.2, Twisted Pair Cabling Requirements To Be Installed, Note, stated:

> The cable distribution system shall be installed in accordance with the specifications identified in Paragraph C.12.43. All outside plant and inside riser shall be installed to provide, as a minimum, cable pairs in the following quantities for the buildings and floors specified below. The contractor is responsible for distributing the required number of cable pairs to separate IDF's located on the same floor. A cable plan shall be submitted to the Contracting Officer for approval two weeks prior to start of installation of cable (this shall also include all retained cable). Additional cables identified and recommended by the contractor to be retained by the VA shall be approved by the Contracting Officer. The contractor shall be responsible for the removal of all telephone or data cable, station wiring (telephone and data) not approved for retention by the Contracting Officer. The contractor shall inform the Contracting Officer concerning location(s) where additional cable pathways are deemed necessary when the cable distribution plan is submitted. The Contracting Officer shall determine the best method of providing additional pathways.

The COTR testified that no existing riser cabling was retained as part of the new cable distribution system in Building No. 3 at West Roxbury because all the existing cable was being used for the telephone system that was in operation, and there was no spare cable. One could not disable the phones that were then working as part of the existing system at the functioning medical center. (Tr. 177-78) Moreover, the existing cable was "not up to the specifications required by this contract as far as telephones are concerned. This telephone contract or replacement contract required all Category 3 [involving speed requirements for data transmission] telephone cabling. . . . The cables that were in existence in Building 3 . . . were not Category 3, which is why we ultimately had them taken out through the contract." (Tr. 224-25) When asked why the reference to retaining cable appeared in the contract, if it was anticipated prior to the contract that they'd all be removed, the COTR replied that "many facilities, as they are growing, install cables and have spare capacity within those cables due to expansion projects." That was not the case here, however. (Tr. 225) The VA would not have accepted the recommendation to retain telephone cabling that existed in any part of the complex in West Roxbury. (Tr. 226) No cable was retained at West Roxbury and the COTR did not remember any proposal to retain cable. (Tr. 231) The Contracting Officer testified that "one day we shut off the old

system and we turned on the new. There is no way we can use the existing without it being detrimental to the system today." (Tr. 287) Mr. Kathuria countered that "you can also have a hard cut. That means you can transfer over from the existing to the new phones also. You can do it that way too." (Tr. 287)

In its Technical Management Requirements Proposal, dated September 3, 1994, in response to VA Solicitation No. 101-20-94, Telecommunications System, at page C-118, IBSI stated the following:

> IBSI agrees and confirms that the installation of the cable distribution system will be in accordance with accepted BICSI standards and coordinated with the VA COTR. Cable used to install the new distribution system (outside plant, inside riser, and station cabling) will conform to meet the requirements of ICEA Publications S-80-576-1988 (Ref. B1.6) as to size, color code, and insulation.

At page C-239, IBSI stated the following:

> All outside plant and inside riser will be installed to provide, as a minimum, cable pairs in the following quantities for the buildings and floors specified below. IBSI is responsible for distributing the required number of cable pairs to the IDF's located on the same floor.

(R4, tab 18)

According to the VA's COTR, the Contractor submitted to him, in approximately July 1995, a schedule for installing the riser cabling. The riser cabling was then installed in Building No. 3 sometime prior to February 5, 1996, the date of an IBSI drawing titled, West Rox. Copper Cable Plan. (R4, tab 50; tr. 167-69) That timing of the installation of the riser cables was also confirmed by a February 7, 1996 message to the COTR. (R4, tab 27; tr. 174-75)

At the hearing, Mr. Kathuria testified that his subcontractor, Johnson Controls, "never bid for it," referring to riser cable, but could not explain why Johnson Controls did not do so, except there might have been riser cable already there (tr. 22-23) or, he guessed, that the "spec must not be very clear" (tr. 26). Mr. Kathuria testified that he incurred the debt to the subcontractor at that time and eventually paid them for the riser cable. (Tr. 23) Mr. Kathuria conceded that the installation of riser cable at the VAMC was required by the contract, although insisting that such requirement was not *clearly* required, and that his understanding of the requirement only came after certain discussions. (Tr. 30) In his March 20, 1998 claim letter, Mr. Kathuria admitted:

> Simply stated, there is requirement in the

> RFP or resulting contract for providing and installing riser cable and cabinets at Building 3 at West Roxbury. Nonetheless, during contract performance, JCNIS approached IBSI with a concern that the VA had directed that riser cable and cabinets be installed at Building 3. IBSI presented this issue to the VA.

(R4, tab 11 at 6)

Appellant's President, Manbir S. Kathuria, Appellant's only witness at the hearing, testified that supplemental agreements were normally worked out between his project manager and the Contracting Officer. Then the Government would prepare the agreement, send it to Appellant, the president would sign it, send it back to the Government, and the Contracting Officer would sign it and send a fully executed copy back to Appellant. (Tr. 13)

Apparently, at some point, Johnson Controls asked for additional compensation for installing risers at West Roxbury, but Mr. Kathuria had no recollection of how the matter arose. (Tr. 80)

At the hearing, Mr. Kathuria seemed to suggest in general terms there might have been some existing cable that might have been retained. However, when asked whether his company or Johnson Controls ever identified cable to be retained, his answer was that he did not know. He could only say it was *possible* that such issue was raised and was the basis for the original request for additional compensation in connection with SA-24. (Tr. 107-09) According to Mr. Kathuria, the contract does not designate which riser cable should be retained and which riser cable should not be retained. That was to be determined during the performance of the contract. (Tr. 116) However, there is nothing in the contract, nor is there specific evidence offered by Appellant in the record, to indicate that any particular existing riser cable was intended or designated to be retained as part of the new cable distribution system. Nor is there evidence in the record that retention of existing cable was actually the basis for the Contractor's initiation of a request for additional compensation for riser cable. To the contrary, Mr. Kathuria answered in the affirmative when asked, "Well, then, is the contractor representing that the – that the $30,000 represents a total riser wiring cabling in Building 3?" (Tr. 281)

The COTR testified that around May 22, 1996, he and the Contractor's project manager discussed riser cabling for West Roxbury. The Contractor "indicated that he felt there may be a need for riser cable to be added to the facility, that more cable was needed, that it had not been included [in the contract price]." The COTR indicated that the riser cabling was indeed included in the contract and he pointed to the applicable specification paragraphs.

By "Cost Proposal Request," dated March 20, 1996, the VA requested the Contractor to submit cost proposals for four items, including "C. Cost, installation and termination of the Riser Cable, Building #3 at the West Roxbury Division." (R4, tab 9; tr. 16) The Contracting Officer testified that, apparently through oversight, she signed this request which had been prepared by a clerical trainee in her office "under the assumption that this

was a legitimate request because she was told by Bill M[aus] that the riser cable was not included" in the contract. (Tr. 240-41, 256)

On April 18, 1996, Appellant's Program Manager, William J. Maus, forwarded cost proposals to the Contracting Officer, including "Item C: (35,165.11) Cost represents installation and termination for services to Building 3." (R4, tab 8; tr. 18-19)

Sometime thereafter, Appellant received Supplemental Agreement No. 24 (SA-24), with an effective date of May 6, 1996, which stated:

> Increase contract by $50,817.01. $35,165.11
> cost represents cost, installation and termination
> of Riser Cable, Bldg. #3 at the W/R Division.
> $15,651.90, cost represents redesing (sic, redesign)
> of the W/R fiber optic cable which includes the
> termination of the sing[le] mode fiber.

(R4, tab 501)

Mr. Kathuria's signature appears thereon, with the date May 18, 1996. The signature block for the Contracting Officer is not signed. On May 22, 1996, the Contracting Officer received the foregoing document for her signature and "realized there's a mistake here, there's a problem here." This was the first time she'd seen this document. She immediately called Bill Maus and met with him to discuss the situation. According to the Contracting Officer, "Bill agreed that, in fact, the riser cable from Building 3 was included." It was her understanding that the issue was resolved and she issued the revised version of SA-24, omitting the reference to riser cable. (Tr. 239-42) It was also her understanding that the work itself had already been done some four months earlier. (Tr. 244, 261) She was not notified that Mr. Kathuria believed he was entitled to additional money for the riser cable until after the arbitration decision concerning a dispute between IBSI and Johnson Controls. (Tr. 251)

Mr. Kathuria testified that he ordered the work to be done by his subcontractor. (Tr. 20) However, he could not recall how long, after he signed SA-24, he directed Johnson Controls to start installing the riser cable (tr. 71) or when he paid Johnson Controls for such work (tr. 72-73, 78-79). Nor could the Contractor identify any specific modification to its subcontract. (Tr. 75-76) He considered the obligation incurred to pay his subcontractor for the riser cable when he authorized such work to be done in reliance on the receipt of the May 1996 SA-24. (Tr. 119)

Subsequently, Mr. Kathuria received the revised SA-24, with an effective date of July 15, 1996, which provided only for the $15,651.90 increase, related to fiber optic cable, and omitted the $35,165.11 for riser cable. When asked what he did with the revised SA-24, what he thought when he saw the riser cables weren't on there, and why he signed it, he stated at the hearing:

> Like I said, you know, if I don't sign it then
> they will withhold the money. They won't
> pay any more money and being a small guy –

> . . . . And also we talked to the contracting officer and she basically she gave me a blank statement, she said keep doing the work and then we'll – let the lawyers settle afterwards. . . So we kept doing the work . . . (and I signed) because I had no choice. Then they would stop until I signed it.

(Tr. 20-21)

The revised SA-24 was signed by Mr. Kathuria and the Contracting Officer, both dated July 16, 1996. (R4, tab 8)

Mr. Kathuria argued that since IBSI took the position, during arbitration between it and the subcontractor, that the riser cable was required by the contract, and since the arbitrator, without stating an explanation, awarded $30,000 to the subcontractor for riser cable, therefore "the spec was not clear enough." (Tr. 33) In a contract for replacement of a telephone system, new phones are required to be installed, but "sometimes they require (new) cable systems, sometimes they don't." (Tr. 42)

In January 1998, an arbitrator determined Johnson Controls to be entitled to contract price increases from IBSI totaling over $600,000, including a $30,000 item for "Riser System Bldg. 3 + Cabinet." (R4, tab 11) Payment of the arbitration award in March and April 1998 included the $30,000 payment from IBSI to Johnson Controls for the riser cable. (Tr. 135)

On March 20, 1998, IBSI filed a Request for Equitable Adjustment (REA) in the total amount of $90,470, which included a $30,000 claim related to the riser cable and stated:

> Simply stated, there is requirement in the RFP or resulting contract for providing and installing riser cable and cabinets at Building 3 at West Roxbury. Nonetheless, during contract performance, JCNIS approached IBSI with a concern that the VA had directed that riser cable and cabinets be installed at Building 3. IBSI presented this issue to the VA. As a result, the VA drafted a "Supplemental Agreement #24" dated May 16, 1996, for the amount of $35,165.11 that was provided to IBSI. *See* Exhibit F. In reliance on that draft document, IBSI paid JCNIS an additional $30,000 for the riser. Subsequently, however, the VA retracted the draft modification. Thereafter, IBSI demanded that JCNIS refund that amount.
>
> The arbitrator found that JCNIS was entitled to payment of $30,000 for this item. Under the circumstances, an independent arbitrator has determined that the *installation of riser cable and cabinets at Building 3 was beyond the scope of the*

> *contract*. Moreover, IBSI clearly relied on the Supplemental Agreement issued by the VA. Under the circumstances, IBSI requests that the VA pay IBSI $30,000.00 for this item. (Emphasis in original.)

(R4, tab 11)

The Contracting Officer issued her final decision on April 23, 1998, denying the riser cable claim as follows:

> [I]t is the government's position that the contract required providing and installing riser cable and cabinets in building 3 at West Roxbury. In your letter you refer to a drafted Supplemental Agreement #24, dated May 16, 1996 in the amount of $35,165.11, which was exactly that a "draft." You should not have relied on it as an actual change to the contract until it was signed by the contracting officer. Nevertheless, after the supplemental agreement was drafted it was discovered that the work in question was in fact a part of the contract and no additional money was owed. Consequently, Supplemental Agreement #24 was edited to delete the additional cost of installation and termination of Riser Cable, Bldg. #3 at the West Roxbury Division. The supplemental agreement, which you signed was subsequently executed to increase the cost of the contract by $15,651.90 to redesign the West Roxbury fiber optic cable which included the termination of the single mode fiber.
>
> Your claim in the amount of $30,000, as it relates to the riser cable, is hereby denied.

R4, tab 12

DISCUSSION

The subject contract required the complete replacement of the telephone system at the West Roxbury VA Medical Center (VAMC), including riser cable. While Appellant raises the fact that reference was made in the specifications to the possibility of retaining some existing cable, this issue was not developed sufficiently to create the basis for an equitable adjustment. Appellant would have to demonstrate that it or its subcontractor reasonably believed that all or some of the existing riser cable was to remain and that it relied upon that belief and adjusted its bid price accordingly. No such evidence was forthcoming. To the contrary, Appellant's pre-award proposal clearly indicated that it intended to provide riser cable. We only have hearsay evidence that the subcontractor did not include riser cable in its price to the Appellant, and we are provided no evidence from

the subcontractor explaining such action. The "essential burden of establishing the fundamental facts of liability, causation and resultant injury" remains with the Contractor. ***Wunderlich Contracting Co. v. United States***, 351 F.2d 956 (Ct.Cl.1965). And, as we have long observed:

> Proof of entitlement to an increase in the contract price or a time extension rests upon the contractor. Where an appeal presents an affirmative claim by a contractor against the Government, the ultimate burden of proof or persuasion is upon the claimant and the final evidentiary question is whether the claim is supported by substantial evidence and proved by a preponderance of the evidence. A claim against the Government may not be allowed merely because it has been alleged.

J.C. Edwards Contracting and Engineering, Inc., VABCA Nos. 1947, 1969, 85-2 BCA ¶ 18,068 at 90,690

Thus, in providing riser cable, the Contractor provided no more than that which the contract required and is not entitled to an equitable adjustment increasing its contract price. Ordinarily, that would be the end of the matter. However, Appellant raises several issues that we feel compelled to address.

There is the matter of the unexecuted change order. Certainly the VA shares a portion of blame in allowing the issuance to the Contractor of an unwarranted cost proposal request and the issuance of the first version of SA-24. On the other hand, the Contractor appears to have initiated the problem by seeking a contract price increase through discussions with an office trainee rather than through discussions with the COTR and/or the CO. In any event, the mistake was corrected prior to the execution of the formal change order by the CO. Under these circumstances, we find no basis to award the Contractor a contract price increase.

The Appellant makes the argument that it relied on the VA's preliminary actions, in appearing to grant his change order request, to its detriment in directing the subcontractor to do the work and making payment therefor. However, based on the evidence presented at trial, we found that the work had already been completed by the time the VA issued the cost proposal request. Payment was not made until approximately two years later. We see no reliance by the Contractor based on the VA's preliminary actions. Moreover, the Contractor is not justified in acting on, or changing its position, prior to such time as it has actually secured a change order. That does not occur until the Contractor and the Contracting Officer reach agreement, and such never occurred in this case. If the Appellant promised payment to the subcontractor for riser cable, without the VA's consent and agreement, that was a matter between the Appellant and the subcontractor for which the VA has no responsibility.

Finally, the Appellant points to an arbitration award against it in favor of the subcontractor for riser cable. That award, the argument goes, must mean that the

arbitrator believed that the riser cable was additional work for which compensation is due. Not necessarily. It only means that the arbitrator found that IBSI owed Johnson Controls $30,000 for the riser cable. We have no way of knowing what considerations went into the arbitrator's award, what facts were presented to the arbitrator, what arguments the subcontractor made. The subcontractor did not testify before this Board to explain the basis for its claim to IBSI. We are certainly not bound in any way by that arbitration award and must make our decision on the basis of the facts presented in the written record and in the testimony at the hearing. While we sympathize with the Appellant's predicament, we are obliged to conclude that Appellant's claim for additional compensation for riser cable cannot prevail herein.

DECISION*

The appeal is denied.

Date: **November 16, 1998**

Morris Pullara, Jr.
Administrative Judge

*This decision shall have no value as precedent and is final and conclusive and may not be appealed or set aside. 41 U.S.C. §608